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80-2146

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General
401 N.W. 2nd Avenue
(Suite 820)
Miami, Florida 33128
(305) 377-5441

QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH AND CONVERSATION OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP AND ARREST (3) THAT ALL SO-CALLED "PROFILE TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE, UNDER REID V. GEORGIA, ___ U.S. ___, 100 S.CT. 2752 (1980) AND 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN UNITED STATES V. MENDENHALL, ___ U.S. ___, 100 S.CT. 1870 (1980); SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218 (1973) AND TERRY V. OHIO, 392 U.S. 1 (1968) AND IS A MISAPPLICATION OF THE FOURTH AMENDMENT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida, the Appellee in the District Court of Appeal of Florida, Third District, and prosecution in the Florida trial court. The Respondent, Mark Royer, was the Respondent in the Supreme Court of Florida, the Appellant in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of pages A1-A10.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District, en banc, reversing the Florida trial court's denial of the Defendant's Motion to Suppress and reversing the Florida District Court panel opinion reported therin, is reported at Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980). The opinion of the Florida Supreme Court denying the State's Application for review (Adkins and Alderman, JJ. dissenting), is contained in the Petitioner's Appendix at "A1" and will be reported by the West Publishing Company. There is no official reporter for citation to this opinion.

II.

JURISDICTION

On March 19, 1981, the Supreme Court of Florida with two Justices dissenting denied the State's timely application for review. A1. On May 19, 1981, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including June 16, 1981. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979) approved and adopted, Hetland v. State, 387 So.2d 963 (Fla. 1980). The constitutional issues

herein were presented and fully argued at all levels of the proceedings below. See, A2-A3 (Motion to Suppress); Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce andy law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV.

STATEMENT OF THE CASE

The Respondent, MARK ROYER, was charged by information with unlawful possession of marijuana and possession of marijuana with intent to sell, arising out of his attempt to transport six-five (65) pounds of marijuana in his luggage through the Miami International Airport on January 3, 1978. 389 So.2d 1008. The Respondent filed a Motion to Suppress the marijuana, which the trial court denied after a hearing. The trial court denied the Respondent's Motion to Suppress upon two alternative grounds: 1) that the Respondent freely and voluntarily consented to the search of his baggage and 2) that the officers, based upon the facts they observed, which corresponded with their experience, had probable cause to believe that the Respondent was transporting narcotics. Id, at n1.

The Florida District Court panel opinion, which was reversed by the present en banc opinion, sets out the facts determined by the trial court, without the factual inferences and editorial remarks of the en banc main court opinion herein:

> "The facts leading up to the search and seizure of the marijuana were the following. Officers Johnson and Magdalena, of the Dade County Public Safety Department, were plainclothes detectives assigned to the County's Crime Bureau, Narcotics Investigation Section, performing duty at Miami International Airport as members of what was known as the Smuggling Detail, consisting of a sergeant and eight officers, who worked in pairs, on shifts. Said officers had acquired knowledge of a "profile" by which it was possible with a substantial measure of certainty to recognize couriers or carriers of drugs in air travel. Such profile had been arrived at by experiences of narcotics officers with a great number of such persons in main drug distribution centers and the target city destination places.
>
> Miami was a known point from which imported drugs,[1] including marijuana, were transported to other target destination cities, one of which was New York City. It was

> known that commercial airlines were used for such transport of drugs by such couriers and others. On a certain day, at the Miami International Airport, the above-named officers observed the defendant as he was about to purchase a ticket on an airline. The defendan's appearance and mannerisms, his luggage and the way he dealt with it, and his means of obtaining his ticket, etc., as observed by the officers were such as to fit the profile, the details and nature of which we purposely do not here state. As disclosed through the testimony of Officer Johnson, the defendant was observed to fit the profile of a drug courier.
>
> The defendant checked his two suitcases, placing identification labels thereon bearing the name "Holt", but without stating his address or telephone number in the spaces provided therefor on the labels. The officers noted the name which the defendant placed on the suitcases."

At this point the Petitioner would note that the en banc Court opinion herein totally discounts the alias used by the Respondent as not significant. 389 So.2d at 1019. However, Detective Johnson, was accepted by the trial court as an experienced airport courier/narcotics officer, testified

that cash only and the lack of identification is central to the couriers efforts to avoid detection and to avoid detection by travelling under an alias. A8. Detective Johnson testified that the failure of a passenger to properly identify himself and his luggage is a violation of the airline regulations governing air travel. A10. He also, testified that he maintains constant contact with police departments in major cities and the Federal Drug Enforcement Administration concerning drug couriers and their activity. Johnson said that he has worked with the Los Angeles and Detroit DEA units and in particular Paul Marconi in developing Miami's profile.

Further, while inserting its view of

1. Even this Court has taken judicial notice of the notoriety of Miami as a illicit drug terminal in United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. 1870 at 1881 (Powell, Burger and Blackmun, JJ. concurring).

the facts, the District Court en banc opinion ridiculed Detective Johnson's actual experience and actual observations of the Respondent as "amateur psychiatry" to be, "totally disregarded." 389 So2d at 1016 n.4. Johnson testified without objection that in the Detectives' training and experience the Appellant's appearance and demeanor attracted his attention and the attention of Detective Magdelena. The Respondent was extremely nervous uneasy, pale and appeared to be looking about to see if anyone was watching him. A4-A8. Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Respondent's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. A4-A8.

The District Court panel opinion,

which was reversed, describes the transaction between the officers and the Respondent:

> "As the defendant was proceeding to enter the concourse leading to the boarding area, after having obtained his ticket and checked his suitcases, the officers approached him, identified themselves as police officer, and asked him if he had time to talk with them, which he said he did. There followed a series of requests by the officers, to none of which the defendant objected, and to each of which the defendant assented. Those consisted of his initial consent to talk to the officers, his production upon request of his ticket (which was to New York City), and his driver's license for indentification (which showed his name to be Mark Royer, not Holt which was the name on the ticket); his consent to move with them out of the main room into a vacant side room for further conversation; his consent to the officer's request that the suitcases be opened (after Johnson had retrieved the suitcases): When the officer's requested his consent to the opening of the suitcases, the defendant produced a key from his pocket and unlocked one of the cases. He explained that he did not know the combination of the combination lock on the other suitcase, and upon request gave his consent to the opening of the other case by the officers, which they did with the aid of a screwdriver. The search revealed the suitcases contained 65 pounds of marijuana. The testimony given by Officer Johnson, which

the court chose to believe, was sufficient to establish, as fact, the consent of the defendant to the several requests of the officers. In his testimony the defendant did not state that he had objected to, or that he had not consented to any of such requests of the officers.

"The defendant testified that during the time he was in the presence of the officers he was not told that he was free to leave; and as to each of the steps or requests to which the defendant consented, he testified (1) he was not told that he did not have to consent, and (2) as to each of such consents, when asked by his lawyer why he consented, he gave the same answer, Viz., "they were police officers and I thought I had to."

"On appeal the defendant does not argue that the court committed error by finding, on the totality of the evidence, that he did so consent, but contends the court's finding of consent was error because he was not told he could refuse consent AND THAT BECAUSE SUCH CONSENTS WERE GIVEN TO POLICE OFFICERS AS A MATTER OF LAW IT COULD NOT BE HELD THAT HIS CONSENTS WERE FREE AND VOLUNTARY. We reject those contentions as being without merit in this case.

"[Footnote]: The testimony of Officer Johnson and of the defendant conflicted on only one item.

> Johnson testified that when he asked the defendant for permission to open the suticases the defendant produced a key from one of his pockets and used it to unlock the one case. The defendant testified that previously the officers had had him empty his pockets, and that he had obtained the key with which he opened one of the cases from the top of a desk upon which the contents of his pockets had been placed by him. In rebuttal thereto, Johnson testified again that the defendant took the key from his pocket to open the case, and testified that the defendant had not been requested to empty his pockets until after he was arrested, after the suitcases had been opened." [Emphasis added].

389 So.2d at 1008-1009.

Upon the foregoing facts the District Court panel opinion herein held, 1) that there is no requirement in the law that the Respondent be advised of his right to refuse consent; 2) that voluntary conversation with police officers is without constitutional impact; 3) that in the totality of the circumstances the trial court could have found voluntary consent; 4) that Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978), is distinguishable because in that circumstance,

the officers had overtly coerced the consent by beginning the smae search that they were requesting; 5) submitted that its holding is inconsistent with Frost; 6) citing inter alia, Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 2d 543 (1966) and United States v. Chadwick, 433 U.S.1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), held that an arrest and detention of the Respondent was proper, where in the Detective's experience and observations he was a drug courier and 7) that the trial court's alternative holding that a warrantless search of the Respondent's luggage under the exigency exception to a warrantless search of the Respondent's luggage under the exigency exception to the warrant requirement was factually supported by the record and lawfully correct. See, 389 So.2d at 1009-1015.

A petition for rehearing en banc was requested by the dissent upon a petition by the Respondent. Id at 1015. The petition

was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court reversed the panel opinion and the trial court.

The en banc decision herein is identical in its structure to the dissent to the panel opinion and is authored by the dissent to the panel opinion. Indeed, the facts relied upon by the en banc court are no different than those stated above. except that the en banc court infers (on a defense appeal) from the barren record that the Defendant's ticket and license were not returned. Id at 1018. Such a factual finding and question was never presented to the trial court. This also of course, also ignores any issue of articulable suspicion to conduct a brief investigation. The fundamental position of the en banc court was simply a reweighing and different view of the facts.

The fundamental error in the en banc court reversal herein is reflected in its view of the factual question of consent found by the trial court and affirmed by the panel opinion. The en banc court opinion refers to the factual finding of consent by the trial court as THE "ALLEGED CONSENT." Id at 1019. Citing Frost, infra, the District Court en banc opinion then takes the view that any movement from the airport concourse to the room forty (40) feet away under Dunaway was an arrest. Id 1018-1019. The Court ignores any possibility of a brief detention of the Respondent for investigation by stating that the alias used by the Defendant was not a suspicious circumstance in the experience of the Court[2]. 389 So.2d at

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2. The District Court's en banc decision and outright rejection of Johnson's experience and factual observations is absolutely refuted by the record. THE DEFENDANT WAS NERVOUS ABOUT SIXTY-FIVE (65) POUNDS OF MARIJUANA!! He was travelling under an alias to avoid detection!

1019 n. 11. The Court says the State conceded at oral argument that the detectives would not have let the Respondent leave the room. Id. at 1018. After ten (10) minutes of discussion with the undersigned, the undersigned stated at oral argument only: 1) that neither the undersigned nor the Court was at the scene and therefore should not speculate as to whether the Respondent would have left before any further proceedings and 2) that assuming that the circumstances amounted to articulable suspicion, the detectives would not have let the Respondent go had he refused consent.[3]

The en banc court then takes the position that Reid v. Georgia, ___U.S.___, 100 S.Ct. 2752 (1980) precludes all stops based upon all profiles and states further that

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[3] Certainly with articulable suspicion the Detectives could have obtained a narcotics dog or engage in some other sort of investigation. See, Harpold v. State, 384 So.2d 279 (Fla. 3d DCA 1980); Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980).

United States v. Mendenhall, __U.S.___, 100 S.Ct. 1870 (1980) is contra. 389 So. 2d 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Respondent was illegally detained, his consent was therefore, automatically invalid. Id at 1018. The Court stated that there was no precedent to sustain the trial court. But see, e.g., United States v. Mendenhall, supra. On September 24, 1980, the State filed its Motion for Rehearing and Motion for Certification noting the grevious error in the en banc decision. On October 21, 1980, the State's Motion for Rehearing was denied. On March 18, 1981, the Florida Supreme Court with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's en banc decision. Al.

V

SUMMARY OF ARGUMENT

The decision of the Florida District Court, construing the Fourth Amendment of the United States Constitution holding: 1) that the mere approach and conversation of a police officer is a detention/stop and arrest; 2) that the facts herein constitute a stop and arrest 3) that all so-called "profile" transactions are illegal no matter what the observed facts are under Reid v. Georgia, ___ U.S. ___, 100 S.Ct. 2752 (1980) and 4) that the consent and search herein were therefore illegal, is in direct and substantial conflict with the rule of this court in United States v. Mendenhall, ___U.S. ___, 100 S.Ct. 1870(1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and Terry v. Ohio, 392 U.S. 1 (1968). In view of this Court's recent decision in Mendenhall and Reid v. Georgia, ___U.S. ___, 100 S.Ct. 2752 (1980) leaving the present issues in a state

of some confusion, this Honorable Court should correct this patent misconstruction of the United States Constitution. The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful interdiction of chronic narcotics traffic. See, United States v. Williams, 622 F.2d 80 (5th Cir. 1980), en banc.

V

ARGUMENT

The decision of the Florida Courts cannot be reconciled with the decisions of this Court in United States v. Mendenhall, __U.S.__, 100 S.Ct. 1870 (1980); Terry v. Ohio, 392 U.S. 1 (1978); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Adams v. Williams, 407 U.S. 143 (1972). In Royer the Florida Third District Court of Appeal has

rejected the mandate of Terry, Mendenhall, Schneckloth, Brown, Draper, and Adams v. Williams, in the airport context, in favor of what it erroneously perceives as the ruling of this Court in Reid v. Georgia, ___U.S.__,100 S.Ct. 2752 (1980). The District Court gives force of law a previous "attraction" to the concept that any approach by the police officer is a "stop." See, State v. Frost, 374 So.2d at 597-598 (Fla. 3d DCA 1979);Royer, 389 So.2d at 1019. Under the guise of Royer and Reid the Florida Third District Court of Appeals has embarked upon a course(in addition to that in the case at bar), of wholesale reversals of Florida trial court findings of consent and articulable suspicion in the airport context. See, Correa v. State, 389 So.2d 1204 (Fla. 3d DCA 1980)(reversed upon rehearing subsequent to Royer assuming that the mere approach of a police officer is a "show of authority"); Stuart v. State, 389 So.2d 4 (Fla. 3d DCA 1980)(reversed see Royer and Frost); Major v.

State, 389 So.2d 1203 (Fla. 3d DCA 1980) (Schwartz, J.)(reversed on rehearing after Royer even though the Defendant signed a written consent form and was advised of a right to refuse consent ; Monohan v. State, 390 So.2d 756 (Fla. 3d DCA 1980)(assuming after Royer that the approach of narcotics officers in a airport is a "stop" per se); Cimino v. State, 390 So.2d 795 (Fla. 3d DCA 1980)('reversed see Reid and Royer). The State has brought four separate petitions before this Court, in Florida v. Rodriguez; U.S.Sup.Ct.Case No. 80-1158; Florida v. Stuart, U.S.Sup.Ct.Case No. 80-1319; Florida v. Harrison, U.S.Sup.Ct.Case No. 80-1449 and the present case, which each demonstrate the misapplication of Reid and Mendenhall and the failure of the Florida District Court to properly apply the prohibitions of the Fourth Amendment. As in the case at bar, the Florida Third District controls the substantive law in airport cases, located as it is, in Miami, Florida.

In Reid, this Court did not reverse the Georgia appellate court, but rather remanded for further consideration. Indeed upon remand, the Georgia appellate court reaffirmed its alternative view reported at State v. Reid, 149 GA.App.685, 255 S.E.2d 71 (1979), that the transaction therein was indeed a consensual transaction. State v. Reid, ___Ga.App.___, 29 Crim.L.Rep. 2133 (1981) [on remand from 448 U.S. 151 (1980)]. The undersigned has argued and anticipated the foregoing result in Reid to no avail in the Florida District Court.

The Petitioner submits that Mendenhall and Reid are entirely consistent with each other and contrary to the District Court's opinion herein. The District Court's opinion has overlooked the fact that the panel in this case properly refused to substitute its judgment for that of the trial court where the evidence clearly supports a finding of free and voluntary consent. See, United States v. Mendenhall. Contrary to the District Court's

opinion, the Mendenhall Court opinion rejects identical movement to that herein, as neither an arrest nor a detention and rejects mere "silent acquiescence" as a per se rule invalidating consent. In the opinion of the court, the Mendenhall court recites preliminary facts identical to those herein as not tantamount to a seizure:

> "On the facts of this case, no 'seizure' of the respondent occurred. [1] The events took place concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official."
>
> 100 S.Ct. at 1877.

The Court's opinion in Mendenhall is

consistent with every respect with Reid (see, Justices Powell, Burger and Blackmun concurring in Reid) and is consistent in every respect with the arguments made by the State time after time before the District Court which have been rejected by the District Court under the guise of Royer and this Court's opinion in Reid.

In the case at bar, as in Mendenhall, the events herein 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant 4) but instead the officers approached him and identified themselves 5) requested but did not demand the Defendant's identification and ticket and 6) the officer's posed a few questions, the primary of which was the false identication the Defendant had given (the same circumstances as in Mendenhall). In reciting Dunaway v. New York, __U.S.__, 99 S.Ct. 2248 (1979), as supportive of the 'movement-is-a-

detention/arrest' proposition, the District Court has overlooked the fact that Dunaway is bottomed upon its facts as stated by the Court, thus: "There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was TAKEN INVOLUNTARILY to the police station." [Emphasis added]. 99 S.Ct. at 2253. The District Court has overlooked the fact that as in Mendenhall the Defendant was only asked if he would accompany the officers. That the Defendant silently accompanied the officers, is without constitutional impact under Mendenhall. 100 S.Ct. at 1878-1879.

As in Mendenhall in the case at bar, the District Court has once again inserted its judgment for that of the trial court upon a question of fact. The question of whether consent was voluntarily given is a question of fact to be determined in light of all the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Recently, in Edwards v. Arizona, ___U.S.____,

29 Crim.L.Rep. 3037 (1981), this Court explained the holding in Schneckloth, thus:

> "The issue in Schneckloth was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances." [Emphasis added]

The District Court under the guise of the Fourth Amendment, has in sum, applied the extraordinary standards of review of consent, which was rejected in Schneckloth, to defeat any State prosecution based upon consent. As reflected in Edwards this is a patently erroneous standard of review under the Fourth Amendment.

The State of Florida in the case at bar and in the decisions above and those that it has brought to this Court, is, faced with a judicial impasse in the Third District Court of Appeal, the seat of the nation's most chronic drug traffic. It is plainly evident that contrary to Terry v. Ohio; Schneckloth

v. Bustamonte and United States v. Mendenhall, the Florida District Court has departed from any correct constitutional analysis under the guise of this court's views in Reid v. Georgia,

To deny that these officers had reasonable belief that it was more likely than not, that the Defendant was transporting narcotics upon the facts known to them in the case at bar, is to deny the validity of their extensive training and experience. The officers simply responded in good faith to the obvious circumstances, which they observed as trained narcotics investigators. The officers also responded in good faith to the overt manifestations of consent of the Defendant. The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United States Constitution. See, United States v. Williams, supra; see also, Stone v. Powell, 428 U.S.465, 496-516(1976)(Burger J.concurring).

VII

CONCLUSION

The Petitioner submits that there is

substantial federal question herein in the airport context regarding the construction of this Court's opinions in Dunaway, Mendenhall, Reid Terry, Adams and Schneckloth. The utter confusion in the opinion in Royer as to this Court's opinions in Reid and Mendenhall, is causing substantial disruption and confusion in the State's prosecution efforts in Florida, the Nation's most chronic drug courier terminal. Illicit narcotics traffic is an insidious cancer eating at the very fabric of our society. Narcotics traffic presents a clear and present danger to the underlying fabric of this nation. The "serbonian bog" of the exclusionary rule should not be extended to the present circumstances. Cf., complaint, in, United States v. Andrews, 474 F.Supp. 456 at 462 (D.Colo. 1979). This Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

JIM SMITH, Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General